

This letter concerns sales of gift certificates. See 86 Ill. Adm. Code 130.101. (This is a GIL.)

June 12, 2007

Dear Xxxxx:

This letter is in response to your letter dated May 8, 2007, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.ILTAX.com to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

ABC submits this request for a general information letter on behalf of an affiliated group of corporations that operate retail websites (hereinafter collectively referred to as 'the Taxpayer'). The Taxpayer is considering whether to hire an Illinois printing company to print and mail gift certificates ordered by its customers on the retail websites. It wishes to obtain advice from the Department of Revenue (the 'Department') concerning whether the performance in Illinois of the below-described services would fall within the 'printer safe harbor exception' found at Section 105/2 of the Illinois Use Tax Act ('UTA').

A. Description of Relevant Facts

1. General Background

Taxpayer is an affiliated group of corporations that operate retail websites that offer a wide selection of products for sale to customers via the Internet. Sales of tangible personal property at retail via the Internet are handled by Taxpayer's retailing entities ('Retailers'). All of the Retailers are located outside of Illinois; Retailers do not operate any retail stores or own any real property in Illinois.

One of the Retailers (the 'Gift Certificate Entity' or 'GCE') sell gift certificates via the Internet. The gift certificates are used solely for the purchase of items from the Retailers on the Internet.

2. Proposed Responsibilities of Illinois Printer

The GCE is considering whether to engage an Illinois printer to print the gift certificates and deposit them for mailing, by common carrier, to the address requested by the purchaser of the gift certificate. It is anticipated that the gift certificates would be mailed to all 50 states. The proposed arrangement would work as follows:

- (a) The GCE would purchase the paper stock and have it shipped to, and stored at, the printer's Illinois facility;
- (b) The printer would 'semi-print' the gift certificates in bulk with the content that is common to each certificate, including logos and terms of sale;
- (c) As gift certificates are purchased from the GCE on the Internet, the GCE would direct the printer to complete the printing by including the remaining content specific to the particular transaction, including the name, address, dollar value and claim code;
- (d) The printer would insert the gift certificate into an envelope and mail it, by common carrier, directly to the address requested by the purchaser of the gift certificate. Postage fees could either be billed directly to the GCE, or to the printer and reimbursed by GCE; and
- (e) The printer may be requested to supply or forward (via the Internet) tracking information to the GCE to permit the GCE to communicate directly with its customers (via the Internet) as to the status of the shipping. In addition, the printer may be requested to supply information (via the Internet) to the GCE to be used for the GCE's daily accounting, reconciliations, and order tracking process.

B. Issue Presented and Proposed Legal Conclusion

Based on the facts outlined above, would the Taxpayer be subject to the duty to collect and remit Illinois sales/use tax on Internet sales (including, but not limited to, gift certificates) to Illinois customers?

Conclusion: No, because (a) the sale of gift certificates is not subject to Illinois sales tax (86 Ill. Adm. Code 130.120(a)) and (b) performance of the above-described services would not create nexus for the Taxpayer in Illinois on its Internet sales of tangible personal property because the activities are protected by the UTA's 'printer safe harbor exception.' (35 ILCS 105/2).

C. Analysis

1. Gift Certificates are not Subject to Illinois Sales Tax

The sale of a gift certificate is not subject to Illinois sales tax. A gift certificate is an 'intangible' which is not taxed under the Retailers [sic] Occupation Tax Act. 86 Ill. Adm. Code 130.120(a). See *also* ST 02-0036-GIL (Feb. 7, 2002). Rather, if a gift certificate is redeemed for tangible personal property to be used in Illinois, Use Tax is due on the selling price of the tangible personal property purchased, whether partially or wholly funded by the gift certificate. ST 06-0125-GIL (Jun. [sic] 7, 2006), ST 02-0036-GIL (Feb. 7, 2002), ST 95-0331-GIL (Aug, 10, 1995).

2. Use of an Illinois Printer Under the Facts Described Above Does Not Create Nexus for the Taxpayer on its Internet Sales of Tangible Personal Property to Illinois Residents

For a seller to be required to collect and remit Illinois Use Tax, it must be a 'retailer maintaining a place of business in this State' within the meaning of Section 105/2 of the UTA. See, e.g., ST 90-0825 (GIL) (Dec. 7, 1990) ('If the seller does not fall within the scope of this definition, there will be no nexus and no tax collection obligation and the buyer will be obligated to self-assess Use Tax and pay that tax directly to the Department.') The use of an Illinois printer under the facts described above does not create nexus for the Taxpayer in Illinois for sales/use tax purposes on its Internet sales of tangible personal property to Illinois residents.

The UTA expressly excludes the activities of a printer from the definition of a 'retailer maintaining a place of business in Illinois':

'Retailer maintaining a place of business in this State', or any like term, means and includes any of the following retailers:

1. A retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State. *However, the ownership of property that is located at the premises of a printer with which the retailer has contracted for printing and that consists of the final printed product, property that becomes a part of the final printed product, or copy from which the printed product is produced shall not result in that retailer being deemed to have or maintain an office, distribution house, sales house, warehouse, or other place of business within this State.*

35 ILCS 105/2 (emphasis added).

The activities to be performed by the printing company on behalf of the Taxpayer fall within the printer safe harbor exception. The information supplied by the GCE — names, mailing addresses, gift certificate amounts and common text for the certificates — is 'copy from which the printed product is produced.' (*Id.*) Similarly, the paper to be shipped to and stored at the printer's office is 'property that becomes a part of the final printed product.' (*Id.*)

Moreover, neither the act of mailing the printed gift certificates by common carrier nor the communications between the printer and the GCE described in paragraph (e) above create nexus for the Taxpayer in Illinois. The Commerce Clause of the U.S. Constitution (and to a lesser extent, the Due Process Clause) limit the ability of states to require out-of-state entities to collect and remit tax. In the area of sales and use tax, the U.S. Supreme Court has held that a corporation must be physically present in a state for that state constitutionally to impose a sales/use tax collection obligation. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The mere use of the U.S. mail or common carrier to send advertisements or deliver goods to customers has regularly been held an insufficient

contact upon which to impose the duty to collect and remit sales/use tax. See, e.g., *National Bellas Hess, Inc. v. Illinois Dep't of Revenue*, 386 U.S. 753, 758 (1967) (recognizing a 'sharp distinction' between 'mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business'). The Internet transmissions of details related to the printing and mailing of the gift certificates described in paragraph (e) above are incidental to the activities of the printer and fall within the printer safe harbor exception.

D. Requested Ruling

Based upon the foregoing facts and analysis, we hereby request the issuance of a General Information Letter confirming that the performance in Illinois of the above-described services would not create nexus for sales/use tax purposes for the Taxpayer in Illinois.

Thank you for your prompt consideration of this request. If you have any questions or require any further details, do not hesitate to contact me.

DEPARTMENT'S RESPONSE:

Gift Certificates

The Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. See the enclosed copy of 86 Ill. Adm. Code 130.101.

The sale of gift certificates represents an intangible right to purchase merchandise at some future time. Therefore, sales of gift certificates are not subject to Retailers' Occupation Tax liability because they are considered sales of intangibles. However, when the gift certificates are redeemed on the purchase of tangible personal property, tax is due on the selling price of that property, whether partially or wholly funded by the gift certificates.

Nexus

Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information.

The following guidelines, however, may be useful to you in determining whether your client would be considered "a retailer maintaining a place of business in Illinois" subject to Use Tax collection obligations.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill.

Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please see Brown's Furniture, Inc. v. Wagner, 171 Ill.2d 410, (1996).

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax liability on the purchase of the goods and have a duty to self-assess and remit their Use Tax liability directly to the State. In such instances, those customers must remit their Illinois Use Tax along with a completed Form ST-44, Illinois Use Tax Return unless they are otherwise registered or are required to be registered with the Department and remit their Illinois Use Tax with a Form ST-1, Illinois Sales and Use Tax Return.

I hope this information is helpful. If you require additional information, please visit our website at www.ILTAX.com or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your factual situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110 (b).

Very truly yours,

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TDC:msk